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In the

Supreme Court of the United States

OCTOBER TERM—1954

No. ~~167~~ 41

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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In the

Supreme Court of the United States

October Term—1954

No. 157

Ryan Stevedoring Co., Inc.,

Petitioner,

—v.—

Pan-Atlantic Steamship Corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONER

This case comes before the Court on writ of certiorari issued to review a final judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the United States District Court is officially reported in 111 F. Supp. 505. The opinion of the United States Court of Appeals for the Second Circuit is officially reported in 211 F. 2d 277 and appears at page 369 of the Transcript of Record.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 25, 1954. The petition was filed on June 21, 1954 and was granted on

October 14, 1954. The jurisdiction of this Court rests on Title 28 of the United States Code, Section 1254 (1).

Questions Presented

(1) Is a contracting-stevedore, who complies with the provisions of the U.S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, §901 *et seq.*, insulated under the very wording of the Act (§905) from any claim or action in which full indemnity (there being no express contract of indemnity) is sought against him by a shipowner who has been held liable to an employee of the contracting stevedore.

(2) If the aforesaid Act, as worded, does not furnish complete immunity to a contracting stevedore against a claim of indemnity, implied in law, of a shipowner who has been liable to an injured employee of the contracting stevedore, can there be indemnity implied in the maritime law (there being no express contract of indemnity) between joint tortfeasors in a non-collision case, *i.e.*, a personal injury action.

(3) After the jury had rendered a verdict in favor of the injured longshoreman against the shipowner herein, Pan-Atlantic Steamship Corporation, the Trial Judge, sitting without a jury, pursuant to stipulation of the parties, decided all questions of fact and law respecting the shipowner's right of indemnity. Where the Trial Judge as the trier of the facts in a non-jury action has found that the shipowner and the contracting stevedore were joint tortfeasors, which is equivalent to a determination that the negligence of each caused or contributed to the

accident, can an Appellate Court on review of the Trial Judge's findings in a non-jury case disregard his findings of causation and draw its own conclusions as to causation where it could not do so had a jury been the trier of the facts.

Statute Involved

The provision of the U.S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, §901 *et seq.*, which is involved is §905 thereof which reads as follows:

"Exclusiveness of liability. The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. (Mar. 4, 1927, c. 509, §5, 44 Stat. 1426.)"

Statement

On July 20, 1949 one, Frank Palazzolo, a longshoreman employed by Ryan Stevedoring Co., Inc., hereinafter referred to as Ryan or petitioner, was injured aboard the S.S. Canton Victory, lying in navigable waters in the port of New York, when he was struck by a roll of paper pulp during said vessel's discharge at Brooklyn, New York.

The S.S. Canton Victory was operated, managed and controlled by Pan-Atlantic Steamship Corporation, hereinafter referred to as Pan-Atlantic or respondent.

The loading of the cargo of paper pulp was performed at Georgetown, S. C., by petitioner, as was the discharge of the vessel at Brooklyn, N. Y.

To recover pecuniary damages for the personal injuries sustained by him, Palazzolo instituted an action against Pan-Atlantic in the Supreme Court of the State of New York, County of Kings, and Pan-Atlantic removed said action to the United States District Court for the Eastern District of New York.

In his complaint against Pan-Atlantic (R. 7-9) Palazzolo alleged that Pan-Atlantic had negligently caused, suffered and permitted rolls of paper pulp to be loaded and transported negligently and had failed to furnish a seaworthy vessel. The theory of Palazzolo's case was that a roll of paper pulp, which had not been "chocked" properly, had jumped out of its tier during the discharge of the rolls of paper pulp and had crushed his leg.

After the action had been removed, Pan-Atlantic impleaded Ryan (R. 10) and sought *indemnity* on allegations that Ryan was exclusively in control of the portion of the vessel where Palazzolo was hurt (R. 12) and that if the rolls of paper pulp were loaded improperly on the S.S. Canton Victory and if the vessel were unseaworthy then said condition had been caused solely by Ryan.

At the opening of trial before Senior Judge Inch of the United States District Court, Eastern District of New York, it was conceded that Ryan had complied with the provisions of the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §901 *et seq.*, and that in addition to compensation benefits there had been paid by Ryan's compensation carrier $9857.36 representing medical expenses in treating Palazzolo (R. 46).

It was also stipulated between Pan-Atlantic and Ryan that all proof dealing with the claimed right of indemnity of Pan-Atlantic against Ryan was to be adduced before the Trial Court at the same time that Palazzolo tried his jury action against Pan-Atlantic and that the Trial Court, without benefit of jury, would determine as a matter of *fact* and *law* Pan-Atlantic's claimed right of indemnity or recovery over.

In accordance with the allegations of Palazzolo's complaint, and in line with the theory upon which Palazzolo's action had been tried, the jury was charged as to unseaworthiness and negligence. The jury rendered a general verdict of $75,000 against Pan-Atlantic (R. 304) upon which judgment was entered.

The Trial Court, in accordance with the stipulation between Pan-Atlantic and Ryan, having heard all of the witnesses in open court (there being no testimony adduced by way of deposition), handed down its decision (R. 316-319; 111 F. Supp. 505) denying any right of indemnity in favor of Pan-Atlantic and granting judgment to Ryan dismissing Pan-Atlantic's third party complaint.

Although Ryan urged to the Trial Court that its compliance with the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, and particularly §905 thereof, insulated Ryan completely from any claim of *indemnity*, the Trial Court preferred to place

its dismissal of Pan-Atlantic's third party complaint upon the findings of fact which it set forth in its opinion (R. 316-319; pp. 506 and 507 of 111 F. Supp.). They revolve around the *uncontradicted* testimony of Pan-Atlantic's own cargo mate, Captain Fisher, showing his control over the entire operation of loading and discharging the S.S. Canton Victory.

This *uncontradicted* testimony shows that although it was Ryan's job to load the S.S. Canton Victory at Georgetown it had to be done "however to the general satisfaction of the mate in charge of the vessel, the master, and the chief officer and his under officers" (R. 214). Captain Fisher's job was to go in and out of the five holds to check to see that Ryan was loading the cargo properly and chocking it for his "primary job, of course, was watching the cargo, this is in port, and to see that it is loaded and stowed properly for the safety of the vessel and the cargo and the crew that sails the vessel" (R. 234). He recognized that his job of supervision was important in so far as it also involved the safety of the longshoremen who came on board to discharge the vessel (R. 251). The Trial Court, completely supported by the record, found as a fact (R. 318) that

> "the cargo mate was in hold No. 3, where the accident occurred, both at the time of loading and unloading to see that everything was properly done and that he was 'primarily concerned to check the damage or the pilferage or *any unsafe method or practice.*'" (Single quoted matter and italics so indicated in original opinion.)

The Trial Court found that according to the cargo mate everything was done properly by Ryan and no complaints were made by him (R. 318).

The ultimate finding of the Trial Court, which sums up appropriately all of the uncontradicted testimony given by the cargo mate, is this (R. 319):

> "Captain Fischer's (sic) own testimony shows his complete knowledge of the loading and unloading operation, the opportunity and ability on his part to discover the defect in stowage at either the loading or unloading port, and his authority to remedy the condition or halt the work."

The Trial Court in denying indemnity to Pan-Atlantic concluded that Pan-Atlantic and Ryan were joint tort-feasors.

Pan-Atlantic appealed from the judgments entered in Palazzolo's and Ryan's favor.

The U. S. Court of Appeals for the Second Circuit affirmed the judgment in favor of Palazzolo but reversed the judgment in Ryan's favor and directed judgment in favor of Pan-Atlantic against Ryan (R. 324-327; 211 F. 2d 277).

Ryan's petition for a writ of certiorari was granted by this Court on October 14, 1954.

Summary of Argument

I. Ryan has complied fully with the U.S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, §901 *et seq.* Under the clear and explicit language of §905 of that Act, the Congress in 1927, with no modifications since that date, has stated that the liability of an employer, as prescribed by the Act "shall be exclusive and in place of all other liability of such employer to * * * anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury

* * * ." By that unambiguous language, the statute here involved is a complete bar to any claim of Pan-Atlantic for indemnity implied in law against Ryan. If the statute was not intended to exonerate an employer such as Ryan from a claim of the kind here involved, then the remedy is with the Congress to modify the language which it employed some 27 years ago.

II. If §905 of 33 U.S.C. is not a complete bar, then there should still be no recovery over based upon indemnity implied (there being no contract of indemnity in this matter) under the maritime decisional law in this, a maritime non-collision tort action. Since this Court has held in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, that there can be no contribution between tortfeasors in a maritime non-collision case in the absence of federal legislation allowing the same and since contribution is only "partial indemnity" (*Erie R. Co.* v. *Erie & W. Transp. Co.*, 204 U. S. 220; *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 138 [C.A. 2]), it would follow on "principle" that there should be no indemnity implied in the maritime law in a maritime non-collision tort case in the absence of federal legislation sanctioning the same.

III. Where the Trial Court, sitting without a jury, has made certain findings of fact respecting the negligence of the parties to the litigation having caused or contributed to an accident to a longshoreman, and said findings flow logically and reasonably from, and are completely supported by, the record, a United States Court of Appeals is in error when it draws inferences contrary to that of the Trial Court. *McAllister* v. *United States*, decided November 8, 1954, not officially reported, unofficially reported in 75 S. Ct. 6.

ARGUMENT

POINT I

Ryan's compliance with the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §901 *et seq.*, is a complete bar to any claim of indemnity by Pan-Atlantic against Ryan.

The first question that petitioner presents to this Court is the meaning to be ascribed to the explicit language which the Congress employed in the "exclusive remedy" provision of the U.S. Longshoremen's and Harbor Workers' Compensation Act, §905 of Title 33 of the United States Code, in so far as it bears upon and controls claims of indemnity (implied in law)[1] by shipowners against stevedores in personal injury actions arising out of maritime torts. The question of the judicial construction to be accorded §905 of Title 33, United States Code, is singularly important to the shipping industry for in every port of the United States where stevedoring of vessels takes place and accidents arise therefrom it is a foregone conclusion that an injured longshoreman will bring action against the shipowner who in turn will implead the stevedore-employer and seek indemnity implied in law or otherwise.

This type of hydra-headed litigation is omnipresent and all courts which have been confronted[2] in recent times with

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1 It is conceded in the case at bar that there is no contractual provision for indemnity (R. 272). Therefore, the argument of the petitioner will not concern itself with provisions of various contracts by which a stevedore has agreed to indemnify a shipowner under certain circumstances and thereby divests himself of the aegis of the statute.

2 Thus, we find the problem decided or discussed within rather recent times in the following opinions: *American Mutual Liability Insurance Co.* v.

the problem of the judicial construction to be placed upon this federal statute, whether it be in *contribution* or *indemnity* actions, have gone in all directions.

This Court in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, decided January 14, 1952, 342 U. S. 282, 72 S. Ct. 277, found it unnecessary to determine whether §905 (Section 5 of the Act) was a bar to a claim of *contribution* for it based its decision on other grounds. Research has disclosed no case to the present where this Court has been called upon to point the way out of the morass and welter of confusion which results from a reading of the decisions of the lower courts which are set forth in footnote 2 hereof.

The path out of the judicial morass, projected by the authorities set forth in footnote 2 hereof, is, we submit, clearly outlined. The statute, without judicial legislation, by gloss or otherwise, should be held to be the "exclusive" liability which the Congress stated it to be in language that admits of no doubt. If the result is harsh to shipowners, then resort should be had to the Congress to modify the statute, as was indicated by this Court in a comparable

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Matthews, 2 Cir., 182 F. 2d 322; *Gill* v. *U. S.*, 2 Cir., 184 F. 2d 49; *Slattery* v. *Marra Bros.*, 2 Cir., 186 F. 2d 134; *Mikkelsen* v. *The Gigville*, 2 Cir., 191 F. 2d 858; *States SS Co.* v. *Rothschild International Stevedoring Co.*, 9 Cir., 205 F. 2d 253; *Crawford* v. *Pope & Talbot Inc.*, 3 Cir., 206 F. 2d 784; *Brown* v. *American-Hawaiian SS Co.*, 3 Cir., 211 F. 2d 16; *Union Sulphur & Oil Corp.* v. *W. J. Jones & Son*, 9 Cir., 195 F. 2d 93; *Standard Wholesale P. & A* v. *Ruckert Terminals Corporation*, 1949 A. M. C. 818, 193 Md. 20; *Liberty Mutual Ins. Co.* v. *Fallendingham*, 94 F. Supp. 17; *Baird & McShain Inc.*, 108 F. Supp. 553; *Coates* v. *Potomac Electric Power Co.*, 95 F. Supp. 779, 96 F. Supp. 1019; *Miranda* v. *City of Galveston*, 98 F. Supp. 245; *Lundberg* v. *Prudential Steamship Corp.*, 102 F. Supp. 115; *Valerio* v. *American President Lines*, 112 F. Supp. 202; *Dubetz* v. *North American Shipping Co.*, not officially reported, reported in 1951 A. M. C. 492; *Lukasiewicz* v. *Moore-McCormack Lines*, 104 F. Supp. 572; *Barber SS Lines* v. *Quinn Bros.*, 104 F. Supp. 78.

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situation in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282.

The factual situation which spawns the question of law presented under this Point is this.

Upon the trial of this matter it was conceded (R. 46):

> "that Ryan Stevedoring Co., Inc., in compliance with the terms of U.S. Longshoremen's and Harbor Workers' Compensation Act, in pursuance thereto there were paid by the compensation carrier for Ryan Stevedoring Company certain sums for compensation and $9857.36 as medical expenses, the reasonableness of which medical expenses is conceded by all concerned."

Having therefore complied with the provisions of the statute dealing with compensation, 33 U.S.C.A. §904, and with medical services, 33 U.S.C.A. §907, Ryan invoked as a defense (R. 15-16) and presented to the Trial Court for determination the effect of §905 of 33 U.S.C.A. which reads as follows:

> "The liability of an employer prescribed in section 904 of this chapter *shall be exclusive and in place of all other liability of such employer to* the employee, his legal representative, husband or wife, parents, dependents, next of kin, and *anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury* * * *" (Italics supplied.)

These words are clear, unambiguous and unequivocal and no aids to legislative intent need be sought in this instance. The unequivocal language is a compelling guide to legislative intention (*United States* v. *American Trucking Associations*, 310 U. S. 534, 543 n. 18; *Schwegmann Bros.* v.

Calvert Distillers Corp., 341 U. S. 384, 390-395). If any aids to legislative intent were sought, they would aid Ryan's contention, if at all.[3]

The Trial Court did not place its exoneration of Ryan upon the language of this federal enactment but decided the claim of indemnity in favor of Ryan and against Pan-Atlantic upon the factual proof which had been adduced.

Upon Pan-Atlantic's appeal, Ryan presented to the U. S. Court of Appeals for the Second Circuit the same argument which it had presented to the Trial Court with respect to the statute here involved. It called the Court's attention to the entire line of cases which had been decided by that Court in which it had taken the position either in direct holding or in dicta that the Act meant exactly what it said, to wit, a complete immunity of the employer (where it had covered its employee with the benefits of the Act) from "all other liability to * * * anyone otherwise

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3 The words are somewhat illumined by the legislative history, however brief and meager it is. Thus, when the Act, as a bill (S. 3170) was introduced on February 17, 1926 by Mr. Cummins it was referred to the Senate Committee on the Judiciary (Cong. Rec., 69th Congress, 1st Session. Vol. 67, p. 4119). It held hearings on March 16, 1926 and on April 2, 1926 (Hearings before a sub-committee of the Committee on the Judiciary, United States Senate, 69th Congress, 1st Session). In Senate Report S. 973, it is stated that (p. 16):

> "Sections (4) (5) and (6) of the bill contain the appropriate provisions for making certain that compensation will be paid, *abolishing liability on the part of the employer except for the payment of the prescribed compensation*, and fixing the time at which compensation begins." (Italics supplied.)

S. 3170, as amended, said amendment not being material to the question at hand, passed the Senate on June 3, 1926 (Cong. Rec. for June 3, 1926, p. 10614) and was later referred to the House Committee on the Judiciary (p. 10820 of Cong Record for June 7, 1926). H. Rept. 1767, dated January 14, 1927, amended S. 3170, which amendment, although not germane, was eliminated when debated (Cong. Rec., Vol. 68, p. 5402). The meager debates in Congress, the Reports of the House and Senate Committees are completely devoid of even a suggestion that §905 of 33 U. S. C. A. (Section 5 of the Act) does not mean exactly what the explicit language says.

entitled to recover damages from such employer at law or in admiralty on account of such injury."

Thus, it was argued to the Court below that in *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F. 2d 322, in dealing with a claim of *contribution* (there being no written contract) and the statute as a defense thereto it had said (p. 324):

> "To impose a non-contractual duty of contribution on the employer is *pro-tanto* to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited, liability to secure compensation to his employees."

In dealing with the effect of §905 of 33 U.S.C.A. as a *release* from a claim of recovery, L. Hand, *Ch.J.*, in a concurring opinion in the cited case said (p. 325):

> "* * * and the reason why I think it should be so construed is that it (the Act) has imposed upon employers an absolute, though limited, liability, in exchange for a release from the preceding unlimited liability, conditional upon negligence." (Parenthetical matter supplied.)

Having disallowed *contribution* on the basis of the statute here involved, the Court below had also disallowed *indemnity*—and this also by reason of the statute.

In *Gill* v. *U. S.*, 184 F. 2d 49, where the United States (shipowner) sought *indemnity* from the employer, Turner & Blanchard, Inc. (Record on Appeal in cited case—folio 45), the question was disposed of in the opinion as follows (p. 55):

> "The dismissal of the cross libel against Turner and Blanchard, Inc., which paid libellant under the provi-

sions of the Longshoremen's and Harbor Workers' Compensation Act was without error. 33 U.S.C.A. §905; American Mutual Liability Ins. Co. v. Matthews, 2 Cir., 182 F. 2d 322."

Eight months after the *American Mutual* case, *supra*, the Court below again had occasion to express its views as to a compensation Act (this time, New Jersey's) being a defense to a claim of *indemnity*. The Court, in an opinion by L. Hand, *Ch.J.*, in *Slattery* v. *Marra Bros.*, 186 F. 2d 134, after reviewing cases dealing with "active"-"passive" negligence said (p. 138):

"* * * Such cases (dealing with active-passive negligence) may perhaps be accounted for as lenient exceptions to the doctrine that there can be no contribution between joint tortfeasors, *for indemnity is only an extreme form of contribution.*" (Parenthetical matter and italics supplied.)

The Court in holding that *indemnity* was not rationally possible where the putative indemnitor was the employer of the plaintiff (and therefore not liable to the injured plaintiff, his employee) said (p. 139):

"We cannot, however, agree that that result (indemnity) is rationally possible except upon the assumption that both parties are liable to the same person for the joint wrong." (Parenthetical matter supplied.)

Following this theme the Court then significantly said (p. 139):

"So far as we can see therefore *there is nobody of sure authority for saying that differences in the degrees of fault will without more strip one of them, if he is*

an employer, of the protection of a compensation act; and we are at a loss to see any tenable principle which can support such a result." (Italics supplied.)

That there must be two parties who are *subject to a tort claim* before one of said parties is entitled to obtain indemnity from the other is found in the *A.L.I. Restatement of Restitution §86*:

"A person who has discharged *a tort claim to which he and another were subject* is entitled to indemnity or contribution from the other in accordance with the rules stated in §§76-85, except to the extent that the character of his conduct precludes restitution." (Italics supplied.)

Since an employer cannot be *subject to a tort claim with another* at the hands of his own employee (where said employer has covered his employee with the benefits obtainable under the Compensation Act here involved), the principle enunciated by Judge L. Hand in *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 139, finds support in the *Restatement of Restitution §86.*

The reasoning of the foregoing was reaffirmed by said Court in passing to the actual question for disposition in *LoBue* v. *U. S.*, 188 F. 2d 800, where Judge Frank, writing for a unanimous Court, in overruling the contention raised by the ship that indemnity could be obtained from a stevedore for an alleged breach of a stevedore's duty to the shipowner to do the work in a careful and efficient manner, said (p. 803):

"And we do not think that there can be any recovery over of indemnity under the maritime law for Jarka's breach of its duty to the United States to do its work

in a careful, efficient manner. The cases which sanction such a liability over on an indemnity theory are inapplicable here, for in those cases, the employer's negligence was the 'sole,' 'active' or 'primary' cause of the libellant's injury. And to permit a partial recovery over on an indemnity theory here would be to sanction an evasion of the rule and the rationale of the Matthews case, supra, by a mere change in nomenclature from 'contribution' to 'indemnity.'"

Following along the chronological judicial path, we find that on June 28, 1951 Judge Abruzzo in *Mikkelsen* v. *The Granville*, 101 F. Supp. 566, dismissed a petition of a shipowner seeking *indemnity* from the injured person's employer. Judge Abruzzo, not finding any contract of indemnity (which is the fact in the case at bar) and relying upon *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322, dismissed the petition for he found that (p. 569):

"the Longshoremen's and Harbor Workers' Act is a valid defense to that petition."

The petition alleged *inter alia* that the employer failed to properly use the gear and to avoid *creation* of dangerous conditions (p. 566 of 101 F. Supp., bottom of right hand column).

Remembering that the dismissal of the petition for *indemnity* resulted from exceptive allegations (p. 568 of 101 F. Supp.—top of left hand column) which posed *solely* as a defense the compliance of the employer with the U.S. Longshoremen's and Harbor Workers' Compensation Act, we find that the U. S. Court of Appeals, Second Circuit, affirmed the dismissal of the petition, 191 F. 2d 858, in a *Per Curiam* opinion which tersely said:

"Affirmed on the authority of American Mutual Liability Ins. Co. v. Matthews, 2 Cir., 182 F. 2d 322."

Rehearing was denied in 192 F. 2d 809.

With the foregoing as the judicial reservoir in the Second Circuit, let us see what other jurisdictions have done.

It would be a disservice to the Court of Appeals of Maryland for the petitioner to paraphrase the reasoning of said Court in writing on the federal Act here involved in *Standard Wholesale Phosphate & Acid Works Inc.* v. *Rukert Terminals Corporation*, 193 Md. 20, 1949 A.M.C. 818. We respectfully refer the Court to pages 29 and 30 of 193 Md. for the reasons which dictated said Court to conclude that the statute here involved was a complete bar, by the very wording of the statute, to a claim of indemnity or contribution. It was there held that a shipowner was within the Congressional language of "anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury." To the same effect, see *Liberty Mut. Ins. Co.* v. *Vallendingham*, 94 F. Supp. 17, 18; *Baird* v. *John McShain Inc.*, 108 F. Supp. 553.

Then, of course, there are decisions such as *States SS Co.* v. *Rothschild International Steve. Co.*, 9 Cir., 205 F. 2d 253 and *Crawford* v. *Pope & Talbot, Inc.*, 3 Cir., 206 F. 2d 784, which have held that the statute is not a bar.

With this background we find that in the case at bar the Court below bypassed the interpretation of the Act and granted indemnity on *its own finding* as to proximate cause, contrary to that of the Trial Court. In arriving at the result it did, it inferentially, without any reference to its own decisions, heretofore set forth, overruled said decisions for, manifestly, had it adhered to them it would have decided this matter as one of law and never reached the question of fact upon which it placed its holding.

Ryan's position is that it is incumbent upon the respondent herein and all shipowners who seek indemnity from a stevedore-employer of an injured plaintiff to show by convincing proof that the Congress did not mean what it said in the explicit language it used in §905 of 33 U.S.C.A.

In no decision bearing upon the point, whether it be in support or in refutation of Ryan's contention, has it been shown that Congress intended anything at variance with the plain and explicit wording of §905. Certainly, Pan-Atlantic has not done so at either the trial or the appellate level.

If Congress simply intended that the liability provided for in the Act should be absolutely exclusive, on March 4, 1927,[4] when the Act, here involved, was passed, it expressed that intention in the language that is found in §905 of 33 U.S.C.A. (Section 5 of the Act).

That would be the only practical conclusion, irrespective of the explicit wording of §905, in order to make the sections of the Act an harmonious well integrated whole.

If §905 were construed contrary to its plain wording it would result in a stevedore and/or its compensation carrier controverting every claim of compensation, with a possible resultant penalty therefor, in order that a formal award

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4 It was not until 11 years thereafter that the N. Y. Court of Appeals held that the N. Y. Workmen's Compensation Act did not furnish a defense to a claim of indemnity by a third person against an employer (*Westchester L. Co.* v. *Westchester C. S. E. Corp.*, 278 N. Y. 175). Similarly, it was not until 12 years after the passage of the U.S. Longshoremen's and Harbor Workers' Compensation Act that a District Court placed the same gloss upon the federal Act, influenced by the *Westchester* case, *supra*. *Federii* v. *Jarka Corporation*, 26 F. Supp. 304.

Certainly, Congressional intent, evidenced by explicit language, cannot be ascertained by decisions which have been handed down 11 and 12 years after Congress had spoken. (See, for example, *Iacone* v. *Cardillo*, 208 F. 2d 696.) The stylish trend of impleader cannot ascribe to Congress an intention which it did not mirror in the explicit language it employed.

could be obtained. The formal award would then assign to the stevedore or its compensation carrier (§933 [i]) title to the third party action. §933(b) of 33 U.S.C.A. These mechanics would fly in the very teeth of §914 of 33 U.S.C.A. which provides for the *prompt* payment of compensation without an award. Nonetheless, a stevedore or compensation carrier would have to controvert every claim so that upon the formal award and the resulting assignment of title to the third party action it would have control over any third party action. Only by obtaining title in such a matter would its liability become absolute and exclusive.

Surely, Congress did not intend that such mechanics be used in order that the stevedore obtain the "exclusive" liability of which Congress spoke in explicit language.

Where the Congress has in clear and explicit language stated in Section 5 of the Act (§905 of Title 33 of the United States Code) that the liability of an employer, as prescribed in Section 4 of the Act, to wit, compensation, "shall be exclusive and in place of *all other liability of such employer to * * * anyone otherwise entitled to recover damages from such employer* at law or in admiralty on account of such injury" it would appear that a stevedore-employer should be entitled "to rest on the clear, unambiguous words of the statute" (*Baird* v. *John McShain, Inc.*, 108 F. Supp. 553).

The benefits which the Congress creates are often measured by the interpretation placed upon them by the judiciary. The benefits that the Congress has created under the Act in question are (1) a guaranteed compensation to an employee for every injury arising out of and in the course of employment, with fault or negligence playing no part, and (2) an absolute, certain, exclusive and circumscribed liability on the part of the employer. As Congressman Graham said in speaking on the floor of the House of Representatives in favor of the adoption of the Act (Con-

gressional Record, 69th Congress, Second Session, March 2, 1927, Vol. 68, p. 5411):

> "Hearings were granted, conferences were held and every endeavor made to secure a bill that would be beneficial to the workman and not oppressive to the employer and that would not be a destructive burden on industry; and I think we have accomplished that."

Manifestly, Congressional intent in part was that the Act should and would "not be oppressive to the employer" or a "destructive burden on industry."

And yet, if impleader by shipowners of stevedoring companies continues in actions wherein the stevedore's employees have sued the shipowner, which impleader is the highly fashionable trend and practice today in the various ports of the United States, the stevedore will be constantly forced to defend such actions even though he has complied with the provisions of the Act—this, in complete nullification of the clear and explicit language of the Congress that there shall be no other liability on the part of the stevedore to "anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury." To allow the continuance of the impleader of stevedores-employers is to sanction what actually amounts to law suits against them by their own employees —this, in contravention to the Act. The shipowner, the primary defendant and third party plaintiff, has become and will become a mere conduit[5] through whom the injured

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5 Indeed, the United States Court of Appeals, Third Circuit, in *Baccale v. Halcyon Lines*, 187 F. 2d 403, reversed *sub nom. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 72 S. Ct. 277, in holding that the employer was liable to the shipowner for what the employer would have been liable for in compensation under the Act, said (p. 406):

> "Nevertheless, the device of the Act must be frustrated if the negligent employer is subject to *full contribution. For then the third party is merely*

employee-longshoreman recovers from his stevedore-employer. The result destroys the basic principle of compensation. (See, *Johnson* v. *United States*, 79 F. Supp. 448; dissent of Crane, *Ch.J.*, in *Westchester L. Co.* v. *Westchester C. S. E. Corp.*, 278 N. Y. 175, 180).

If the scheme of things is to change, then Congress should legislate further to modify its explicit language.[6]

POINT II

In maritime non-collision tort actions, contribution and indemnity have merely in the past connoted a difference in the *quantum* of recovery. If legislation is necessary in order for admiralty to have a substantive rule of contribution between joint tortfeasors, then legislation should also be necessary to fashion a rule of indemnity in this type of case in the absence of an express contractual provision for indemnity.

Research has disclosed no case where this Court has held that there can be indemnity, as implied in the maritime law, in a personal injury case, *i.e.*, non-collision, where the putative indemnitee has been held liable to the putative indemnitor's employee.

Indemnity has been characterized as "an extreme form of contribution" (*Slattery* v. *Marra Bros.*, 186 F. 2d 134,

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the conduit between employer and employee for the transfer of damages in excess of compensation." (Italics supplied.)

6 The petitioner appreciates that the meaning to be accorded §905 of 33 U. S. C. A. (Section 5 of the Act) depends wholly upon the language employed by, and the intention of, the Congress. However, to round out the reservoir of law on this subject, the petitioner has annexed hereto an Appendix which shows that, out of 14 states which have passed on the "exclusive" liability feature of their respective compensation statutes, 9 states have held the same to be a bar to a claim of indemnity and 5 states have not.

138), and as *full contribution* (*Baccile* v. *Halcyon Lines*, 187 F. 2d 403, 406; reversed on other grounds *sub nom. Halcyon Lines* v. *Haenn Ship Ceiling*, 342 U. S. 282).

Similarly contribution has been characterized as "partial indemnity." *Erie R. Co.* v. *Erie & W. Transp. Co.*, 204 U. S. 220.

Preliminarily it would therefore appear that there is no difference in theory between contribution and indemnity and that such terms connote a difference in the *quantum* of recovery, *i.e.*, a total shifting of the economic loss or a percentage distribution.[7]

If there is no difference in theory between contribution and indemnity, then the result arrived at by this Court in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, is the touchstone in this matter. If it requires legislation to allow a substantive right of contribution in non-collision maritime tort actions, then it should follow that the same relief would be necessary in order to read into the maritime law a substantive right to recover the fullest contribution possible, *viz.*, indemnity.

That legislative action is necessary in a situation of this kind is further seen from an appreciation of two principles of law.

First, indemnity, implied in the *common* law, is a quasi-contractual right (Woodward, *Law of Quasi-Contracts*, sec. 259; *Contribution and Indemnity between Tort-feasors*, Robert A. Leflar, 81 Pa. Law Review 130, pp. 146-147; 42 *C. J. S. Indemnity* §§20-25; *Schwartz* v. *Merola Bros. Construction Corp.*, 263 App. Div. 631, 637, aff'd 290 N. Y. 145).

If this quasi-contractual right were sought to be enforced in admiralty, it would appear that admiralty would have

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[7] Prosser, *Torts*, p. 1117 (1941 ed.).

no jurisdiction over such a claim. *Robinson on Admiralty*, page 197 *et seq.* (1939 ed.).

How can it then be said that indemnity exists as a substantive right in the maritime law under the circumstances here present if there would be no jurisdiction to enforce that right within the very framework of the body of law in which the right is supposed to exist.

The second principle of law making legislative action necessary in connection with a right of indemnity in favor of a shipowner against a stevedore-employer is this.

A stevedore-employer upon his compliance with the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §901 *et seq.*, cannot be subject to a tort claim by his own employee. 33 U.S.C.A. §905.

Thus, the fundamental requisite for a claim of indemnity to exist, as stated by the *Restatement of Restitution* §86, is missing. In the cited section of the Restatement it is said that

> "A person who has discharged *a tort claim to which he and another were subject* is entitled to indemnity or contribution from the other in accordance with the rules stated in §§76-85, except to the extent that the character of his conduct precludes restitution." (Italics supplied.)

Indeed, Judge L. Hand in *Slattery* v. *Marra Bros.*, 186 F. 2d 134 (C.A. 2), said (p. 139):

> "We cannot, however, agree that that result (indemnity) is rationally possible *except upon the assumption that both parties are liable to the same person for the joint wrong.*
>
> . . . . . .

"So far as we can see therefore there is nobody of sure authority for saying that differences in the degrees of fault between two tortfeasors *will without more strip one of them, if he is an employer, of the protection of a compensation act; and we are at a loss to see any tenable principle which can support such a result.*" (Italics supplied.)

This very same approach was used by the United States Court of Appeals, Second Circuit, in *Spaulding* v. *Parry Nav. Co.*, 187 F. 2d 257. In the cited case indemnity or contribution was denied since the third party defendant was not liable on the facts to the plaintiff there. Without such a finding, there could be no right of indemnity or contribution. Again, we have the principle that the third party defendant must be subject or liable to a tort claim by the plaintiff in order for a defendant to obtain indemnity.

No matter which way one turns, one returns to the place of beginning. The Act here involved by its express language grants immunity to the stevedore-employer from any claim over, whether for contribution or indemnity. Further, the rationalization behind the indemnity concept fails where a third party, sued by a stevedore's employer, seeks a right over against the stevedore-employer.

Resort to legislative action would enable all interests to be represented at hearings or inquiries so that all interests could explore the application of a rule granting indemnity in connection with §905 of the Act (cf. *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282, 286, 72 S. Ct. 277, 280.

If no right of indemnity exists under the maritime law in a case of the type here involved, the ensuing discussion that the Trial Court's findings and inferences are supported by the evidence and permitted, if not compelled,

a dismissal of the third party complaint becomes academic. However, to round out the full reservoir of decisional law, petitioner develops under Point III the evidence which fully supports the findings and inferences of the Trial Court.

POINT III

The Trial Court's findings and inferences respecting causation are fully supported by the evidence. The United States Court of Appeals was in error in arriving at a different finding of causation and the quality thereof.

If indemnity exists in the maritime law in favor of a shipowner against the employer of an injured maritime worker in a personal injury action, then admiralty has adopted, although never so held by this Court, that there are different degrees of fault or negligence between tortfeasors which different degrees of negligence constitute tortfeasors either "active" or "passive."

Whether a party is "actively" or "passively" negligent is ordinarily a question of fact for a jury's determination. *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 328.

If Pan-Atlantic and Ryan had not stipulated that all questions of fact and law were to be tried and to be determined exclusively by the Trial Court, without benefit of a jury, then in the normal course of procedure the entire case would have gone to the jury for determination in contrast to merely Palazzolo's right of recovery against Pan-Atlantic. Had the jury decided, as the Trial Court actually did in this case, that Pan-Atlantic and Ryan were joint tortfeasors and that Pan-Atlantic was not entitled to recover indemnity from Ryan, we think it could not be gainsaid that the Court below would have been limited on its review to determining whether there was evidence to sup-

port the finding of the jury. Where the Trial Court has become, pursuant to the stipulation of Pan-Atlantic and Ryan, the trier of the facts respecting the right of indemnity, does not the same rule or yardstick apply respecting the scope or limit of review by the Court below?

As we read the recent decision of this Court in *McAllister* v. *United States* (Nov. 8, 1954), not officially reported, unofficially reported in 75 S. Ct. 6, the answer to the foregoing question is in the affirmative. Now let's see what the Trial Court did and what it found in the record.

Manifestly, in order to have arrived at the conclusion it did the Trial Court must have inherently found that the negligence of Pan-Atlantic and Ryan jointly caused or contributed to the happening of the accident. Such a question of causation is a question of fact. *F. E. Grauwiller Transportation Co., Inc.* v. *Gallagher Sand & Gravel Corporation*, 153 F. 2d 384, 385.

In denying a right of indemnity and in dismissing the third party complaint, the Trial Court obviously found Pan-Atlantic guilty of "active" negligence. That Pan-Atlantic affirmatively and actively participated in the tort will be seen hereinafter.

The plaintiff's witnesses testified to a man that there were no chocks of any kind and that the rolls of paper pulp were secured by pieces of dunnage, described on occasion as "scrap" dunnage or firewood (R. 66, 68-69, 86, 94-95, 126, 275-276). According to some of the plaintiff's fellow employees wedges were not supplied and used by the ship because Pan-Atlantic didn't believe in wedges (R. 127, 285).

Pan-Atlantic's cargo mate, Don Fisher, testified that chocks and dunnage are ship's equipment (R. 256) and that they were available on the ship and on the dock at Georgetown (R. 236). Indeed, Fisher testified that he saw chocks being used at the loading port (R. 236) and that

at the very time of the accident to Palazzolo at the discharging port and at the very bottom tiers which are involved in Palazzolo's accident he had seen chocks (R. 243).

There was thus presented to the jury a sharp issue of fact which the jury resolved in the plaintiff's favor. Inherent in its verdict is the finding that Pan-Atlantic did not supply any chocks but only supplied makeshifts such as dunnage or firewood which were inadequate to prevent the roll from "jumping" and injuring the plaintiff.

Further, the uncontradicted testimony of Pan-Atlantic's Captain Fisher shows his complete knowledge of the loading and unloading operation and his control over the same (R. 214, 243, 251). He would check to see that Ryan was loading the cargo properly and *chocking* it (R. 234). It was his job to see that what was done by Ryan was done properly (R. 234). Similarly Captain Fisher was in hold No. 3, where Palazzolo was hurt at the time of the accident and from 5 to 10 minutes prior thereto (R. 238). His purpose in being there according to his own testimony was, among other things to check "*any unsafe method or practice*" (R. 260). He was satisfied that Ryan had loaded No. 3 properly (R. 260).

Upon this testimony, the Trial Court concluded (R. 317):

> "In my judgment there is sufficient evidence in this record to justify a finding of negligence on the part of Pan-Atlantic by the jury, and *also*, pursuant to the stipulation of the parties, *for the Court to make such*

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[8] See *Contribution and Indemnity* by Robert A. Leflar, 81 Pa. Law Rev. 130, 147, where the author correctly says:

> "But in tort indemnity cases, the leading facts are apt to be acts and relationships out of which tort liabilities have arisen, and it will often follow from this that the question of unjust enrichment involved in the granting of indemnity will have to be decided on substantially the same principles as those which controlled the creation of the original tort liability."

a finding with respect to the issues raised by the third party complaint." (Italics supplied.)

Pan-Atlantic has been held liable for its own *affirmative* negligence and *active* conduct in (a) supplying inadequate equipment and (b) allowing its vessel's cargo to be stowed with inadequate gear, which was observed by the mate whom it had placed in charge and who controlled and supervised all loading and discharging operations.

If the Trial Court had granted indemnity, as implied in law, in the face of the inherent findings of the jury and the evidence embraced in this record, it would have flown in the face of the Court's holding in *American Mut. Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322, that (p. 324)

> "* * * no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. Nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability *arising out of the shipowner's own negligence*. In the absence of an *express* promise, such an implication would be utterly unreasonable." (Italics supplied.)

To the same effect, see the *Per Curiam* opinion of the Court denying the shipowner's petition for rehearing in *Mikkelsen* v. *The Granville*, 192 F. 2d 809, 810.

This is *not* a case where Pan-Atlantic has been held liable because any negligence of Ryan has been imputed to it. Pan-Atlantic has been held liable for an unseaworthy con-

dition due to improper gear *furnished by it* and used for the purpose intended—this, to the knowledge of Fisher, its cargo mate in charge and control of the loading and discharging operation. From Fisher's uncontradicted testimony we learn that his duties were many (R. 234) and included the checking of the cargo to see that it was loaded and chocked properly. Indeed, he stated that

> "The primary job, of course, was watching the cargo, this is in port, and to see that it is loaded and stowed properly for the safety of the vessel and the cargo and the crew that sails the vessel" (R. 234).

He then expanded his testimony to include in this category the safety of longshoremen who come on board to discharge the cargo (R. 251).

According to Fisher, Ryan's job at Georgetown was to load the vessel (R. 214)

> "to the general satisfaction of the mate in charge of the vessel, the master, and the chief officer and his under officers."

As far as Fisher was concerned it was his job to see that everything was done right and Ryan did do everything right as far as he was concerned in loading and discharging the vessel (R. 260). The very bottom tier, involved in this accident, was put in to his satisfaction (R. 259). If anything wrong had been done he would have complained to Ryan's pier superintendent but he made no complaints (R. 260) for the reason that he was completely satisfied. Had he seen anything improperly done he would have stopped it (R. 261).

From his own testimony he had the right and the duty to stop any improper operation and knock off the stevedores. If he did not do so, the most that Pan-Atlantic

can urge is a factual picture which shows that, *at best*, if at all, Ryan is pitched with the same tar.

Not only was everything done to the satisfaction of Fisher at the port of loading but everything was done properly at the port of discharge. He was in No. 3 hold where Palazzolo was injured at the time of the happening of the accident and had been there watching the operation for 5 to 10 minutes prior to the accident (R. 238).

Fisher was not down in No. 3 hold at the time of loading and discharging to take in the sights nor to welcome aboard passengers embarking on a Caribbean cruise. He was a *cargo* mate and in connection with the cargo he

> "was primarily concerned to check the damage or the pilferage or *any unsafe method or practice*" (R. 260).

In holding that Pan-Atlantic was a joint tortfeasor for its active participation in the tort, the Trial Court was compelled to say of the testimony that (R. 319)

> "it is plain that Pan-Atlantic's cargo officer did not properly perform his admitted duty to supervise the safe and careful loading of the vessel. * * * Captain. Fischer's (sic) own testimony shows his *complete knowledge* of the loading and unloading operation, the *opportunity and ability* on his part to discover the defect in stowage at either the loading or unloading port, and his *authority* to remedy the condition or halt the work." (Italics supplied.)

Omnipresent control by Pan-Atlantic through the activities of Fisher saturates this entire record. Its wrongful conduct has been found by the jury. *Sequitur* if Pan-Atlantic under any legal legerdemain has discharged a duty which as between itself and Ryan it was the latter's obligation to discharge, Pan-Atlantic as "the payor is barred

by the wrongful nature of his (its) conduct" from obtaining indemnity. *Restatement of Restitution*, §76. Even where indemnity is sought by one of two defendants held *directly liable to the plaintiff* (not present in the case at bar) indemnity could not be obtained where "after discovery of the danger, he (the indemnitee) acquiesced in the continuation of the condition." *Restatement of Restitution*, §95.

Those decisions of state and federal courts dealing with claims of indemnity have employed various phraseology in disposing of these claims. Disposition at times has revolved around "active and passive negligence," "active and passive cause," "primary and secondary negligence," "primary and secondary duty," "primary and secondary cause," "joint tort feasors" and "particeps criminis." Nomenclature has been imprecise at times.

However, one thread binds up all these decisions. The thread common to all or the principle by which contentions for indemnity are parsed is that one who has participated by active conduct in a tort can have no recovery over. *Union Stock Yards Company* v. *Chicago B. & Q. R. Co.*, 196 U. S. 217, 25 S. Ct. 226; *Mikkelsen* v. *The Granville*, 192 F. 2d 809; see excellent discussion in *Falk* v. *Crystal Hall, Inc.*, 200 Misc. 979, aff'd 279 App. Div. 1071; *Phoenix Bridge Co.* v. *Creem*, 102 App. Div. 354, 356, aff'd 185 N. Y. 580; *Edwards* v. *Sophkirsh Holding Corp.*, 280 App. Div. 168, aff'd 304 N. Y. 850; *Adler* v. *Tully & Di-Napoli, Inc.*, 274 App. Div. 1001, aff'd 300 N. Y. 662; *Dolnick* v. *Edward Donner Lumber Corp.*, 275 App. Div. 954, aff'd 300 N. Y. 660.

Since it is fundamental learning that indemnity, as implied by the common law in certain circumstances, is an equitable doctrine and that the delinquencies of the parties are to be weighed on the basis of the ethical quality of their tortious acts, it was, it is respectfully sub-

mitted, gross inequity for the Court below to have reversed the Trial Court and to have granted indemnity in favor of Pan-Atlantic (assuming *arguendo* that indemnity exists in the maritime law in a personal injury action) where Pan-Atlantic, the putative indemnitee, had been found by the jury by virtue of its general verdict to have *furnished* improper gear and to have been in complete control of the operation of loading and discharging the vessel.

If indemnity exists under the maritime law where the parties are aligned as they are in the instant matter then to allow a recovery over by Pan-Atlantic against the petitioner herein would also place a premium on inaction (*Falk* v. *Crystal Hall*, 200 Misc. 979, 985, aff'd 279 App. Div. 1071) and allow a shipowner to point his finger at a stevedoring firm and say

> "I am furnishing you with defective equipment but I have a right over against you in the event that one of your employees is injured thereby. I also observe your loading and discharging operations and they are all right with me now but if a court or jury should hereafter hold that I guessed wrong then the court will allow me to get indemnity from you although at this time I am folding my arms and telling you that you are properly performing your stevedoring services."

It is urged by Ryan that the record amply supports the determination and findings of the Trial Court and the United States Court of Appeals was in error in reversing the judgment of the Trial Court which dismissed the third party complaint. What this Court said in *McAllister* v. *United States*, 75 S. Ct. 6, is completely apposite to the case at bar (p. 9):

> "Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous."

CONCLUSION

The judgment in the Court below should be reversed and that entered in the United States District Court should be reinstated with costs to the petitioner in this and all other Courts being granted.

Respectfully submitted,

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